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No. 92-1857

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

Royal Food Products, Inc.,
Petitioner,

vs.

Buckeye Union Insurance Company, et. al.,
Respondents.

MOTIONS TO DISMISS AND FOR SANCTIONS
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. WAS PETITIONER'S COMPLAINT PROPERLY DISMISSED FOR FAILURE TO STATE SPECIFIC ALLEGATIONS UNDER THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT AND OHIO REVISED CODE SECTION 2923, UPON WHICH RELIEF COULD BE GRANTED?

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STATEMENT OF THE CASE

Royal Food Products Company ("Royal") filed a four (4) part complaint against several parties, including the agencies herein: American States Insurance Company ("American States")[1]; Crabbe Brown Jones Potts & Schmidt ("Crabbe Brown"); Florence Nay ("Nay"); and Seasonings Etcetera, Inc. ("Seasonings")[2]; Lane Alton & Horst ("Lane Alton") and Wirtz & Kohn.

Royal alleged in count I of the complaint that all respondents violated the Racketeer Influenced and Corrupt

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[1]In accordance with Supreme Court Rule 29.1, Lincoln National Corporation is the parent company of American States and American States has no subsidiary companies.

[2]There is no parent or subsidiary company to list in accordance with Supreme Court Rule 29.1.

Organizations Act, 18 U.S.C. Section 1961, et. seq. In count II of the complaint, Royal alleged that Buckeye Union Casualty Co. breached its fiduciary duty as Royal's insurer. This count does not involve the parties represented in this brief in opposition. In count III of the complaint, Royal alleged that the respondents were liable for treble damages pursuant to 18 U.S.C. Section 1961 et. seq. In count IV of the complaint, Royal alleged that statutory sanctions should be imposed on the respondents pursuant to Chapter 2923 of the Ohio Revised Code.

Respondents filed motions to dismiss which were supported by memoranda of law and opposed through responses by Royal. The trial court dismissed all four (4) counts.

Following the dismissal, Royal presented a motion for relief from

judgment pursuant to Rule 60(B) of the Federal Rules of Civil Procedure. Certain defendants filed motions for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure. The trial court overruled the motion for relief from judgment and granted the motions for sanctions.

Royal initiated an appeal in the Sixth Circuit. The appeals court affirmed the ruling of the trial court and imposed additional Rule 11 sanctions on petitioner on January 13, 1993. Petitioner requested a rehearing en banc on January 25, 1993 which was denied on February 24, 1993.[3]

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[3]Rule 14(a) for the United States Court of Appeals for the Sixth Circuit states:

> A suggestion of rehearing en banc will also be treated as a petition for rehearing before the original panel.

Supreme Court Rule 13.4 states:

The appeals court issued its mandate on March 4, 1993.

Royal then petitioned this court for

The time for file a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate. However, if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment. A suggestion made to a United State court of appeals for a rehearing en banc pursuant ot Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule.

a writ of certiorari.

Petitioner asserts that it was a tenant at a building located at 407 North Grant Avenue, Columbus, Ohio, and that it had an insurance policy with Buckeye. (Complaint, paras. 4,. 5). On August 9, 1988, one of the floors at 407 Grant Avenue failed, a water main was fractured, and the petitioner lost inventory, operations, furniture and equipment. (Id., paras. 13, 24, 15). According to the petitioner, his insurer Buckeye, investigated the accident and allegedly determined that the floor collapsed as a result of an overload. (Id., paras. 16, 17). Petitioner asserts that defendant Seasonings caused the overload. (Id., para. 12).

According to the petitioner, Buckeye then paid the petitioner the policy limits that the petitioner was entitled to

receive under his policy that petitioner had with Buckeye. (Id., para. 37). Petitioner also asserts that respondents Lane Alton, Crabbe Brown, Nationwide, American States and Wirtz & Kohn are defending an action in the Court of Common Pleas of Franklin County, Ohio, filed by Grant Avenue Properties, the owner of the property at 407 North Grant Avenue, and are attempting to "blame Grant Avenue Properties for the accident and for the damages caused by said accident." (Id., paras. 28-34). Interestingly, counsel for the petitioner Royal in this action, is also counsel for Grant Avenue Properties in the state action in the Court of Common Pleas of Franklin County.

In count I of its complaint, Royal alleged that American, Crabbe Brown, Seasonings, Nay, Lane Alton, and Wirtz & Kohn violated RICO. (Id., paras. 1, 33).

In count III, Royal alleged that the above-named defendants were liable for treble damages pursuant to 18 U.S.C. Section 1961 et. seq. (Id, para. 39). In count IV, Royal alleged that statutory sanctions should be imposed upon said defendants pursuant to Chapter 2923 of the Ohio Revised Code.

SUMMARY OF THE ARGUMENT

In his petition for a writ of certiorari, counsel for the petitioner posed two questions for review.

I. Does not a highly constricted de novo review that ignores critical elements of the pleadings followed by a Rule 12(b)(6) dismissal constitute a deprivation of the constitutional right to trial?

II. Would not actions over a period of two years by a conspiracy among counsel as directed by their insurance company clients which demonstrate the use of perjury, fraud and other misconduct constitute such a pattern of racketeering activity as is prohibited by the Racketeer Influenced and Corrupt Organizations Act?

Petitioner then proceeds in a vain attempt to support his argument. As support, petitioner offers Conley v. Gibson, 355 U.S. 41 (1957), Hishon v. Spalding, 467 U.S. 69 (1984) and a More Definitive Statement made by petitioner's president. Petitioner also indicates that

both the trial court and appeals court relied only on one paragraph of the original 42 paragraph complaint. (Petition for a Writ of Certiorari by Royal Food Products pp. 14-15).

Petitioner quotes Hishon to say that dismissal should be affirmed only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." (Id., pp. 14-15). This is precisely the standard applied by the district court at page 5 of its opinion in this case.

> It is well settled that a district court may not dismiss a claim under rule 12(b)(6) for failure to state a claim unless it is apparent beyond a doubt to the court that the plaintiff can prove no set of facts which would entitle him to relief. Conley v. Gibson, 355 U.S. at 45, 46. In determining whether the facts presented in a complaint support a claim upon which relief can be granted, the district court is to liberally construe the facts in the light most favorable to the plaintiff. Scheuer v. Rhodes, 416

U.S. 232, 236 (1974).

The district court on page 8 of its opinion held that,

> [P]laintiff's failure to plead even the most basic requirement of a RICO violation, racketeering activity, makes it clear that there is no conceivable set of facts which plaintiff could prove which would entitle it to relief. (Emphasis added).

Counsel for petitioner seems to be of the opinion that a More Definitive Statement from petitioner's president and a 42 paragraph complaint should support his "constitutional right to trial". Petitioner misses the important point that the More Definitive Statement and Complaint must contain worthwhile material to be considered helpful to his case.

While there is definitely a constitutional right to trial, petitioner has twice had his day in court and has failed miserably on both occasions.

Petitioner seems to have missed the more important and more critical points that a RICO cause of action must: plead precisely the RICO section allegedly violated, show a pattern of racketeering activity where there is both continuity and relationship among the predicated acts and allege the existence of a RICO enterprise.

The argument of respondents which follows, specifically and correctly addresses each of these elements. Respondents submit that after reviewing this argument in opposition, the petition for a Writ of Certiorari should be denied.

ARGUMENT IN OPPOSITION OF WRIT OF CERTIORARI

I. THE DISTRICT COURT PROPERLY GRANTED THE RESPONDENTS' MOTION TO DISMISS ON COUNTS I AND III BECAUSE THE PETITIONER FAILED TO STATE A CLAIM PURSUANT TO THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT, 18 U.S.C. SECTION 1961, ET. SEQ. (RICO) UPON WHICH RELIEF COULD BE GRANTED.

a. The Petitioner Failed To Allege The Commission Of Any Predicate Acts Or To Specify What Sections, If Any, Of 18 U.S.C. Section 1962 Respondents Allegedly Violated.

In a RICO case, it is essential to plead precisely the RICO section allegedly violated. Reynolds v. East Dyer Development Co., 882 F.2d 1249, 1251 (7th Cir. 1989). The plaintiffs in Reynolds contracted to have a new house built. Shortly after moving into the house, the plaintiffs began to experience problems with the house. Evidence suggested that the problems were caused by soft soil under the foundation. Before the

foundation was laid, the builder informed the plaintiffs that it had come across soft soil and explained to the plaintiff how he could cure the problem. The plaintiffs gave the builder their approval to continue with construction.

The plaintiffs filed suit against the land developers under RICO, 18 U.S.C. Section 1964. They alleged that the defendants received results of soil boring tests that showed that the plaintiffs and sixteen (16) other lots in the subdivision had soil unsuitable for building and that the defendant committed fraud by not disclosing the report before selling the lot. The circuit court upheld the dismissal of both RICO counts in part because the complaint failed to identify the RICO section allegedly violated. (Id., at 1251). The plaintiff's claim of fraud was not supported by allegations or

evidence that the defendants lied or attempted to conceal the soil conditions. (Id., at 1251, 1252).

Like the plaintiffs in Reynolds, the petitioner in the case at bar failed to identify any specific RICO sections violated by the respondents. The Court is not obliged to comb the record or to conduct the legal research necessary to construct an argument from the facts as given. (Id., at 1254). The petitioner cannot obtain relief under RICO because it did not allege a specific RICO violation. Therefore, the district court properly dismissed and the appeals court properly affirmed the dismissal of counts I and III.

As stated by the district court and agreed by the appeals court, there are only four (4) racketeering activities, as defined by 18 U.S.C. Section 1961, that

are even remotely related to the case at bar. (Opinion and order of the district court p. 6). The four sections are: (1) 18 U.S.C. Section 1503 (obstruction of justice); (2) 18 U.S.C. Section 1512 (tampering with a witness, victim, or an informant); (3) 18 U.S.C. Section 1513 (retaliating against a witness, victim, or an informant); and (4) 18 U.S.C. Section 1957 (engaging in monetary transactions derived from specified unlawful activity). (Opinion and order of the district court pp. 6, 7). The petitioner's allegations do not meet the requirements for a violation under any of these sections.

Having failed to make an allegation of racketeering activity, the most fundamental element of a RICO claim, petitioner failed to state a claim in counts I and III upon which relief could be granted. Consequently, said complaints

were properly dismissed pursuant to Federal Rule 12(b)(6). Davis v. Passman, 442 U.S. 228, 244 (1979).

b. **Petitioner Failed To Allege Any Pattern of Racketeering Activity.**

Not only must a plaintiff allege specific RICO violations, but he must also show a pattern of racketeering activity. A pattern of activity is produced when there is both continuity and relationship among the predicate acts. H.J. Inc. v. Northwestern Bell Telephone Company, 492 U.S. 229 (1989). The petitioner failed to make such an allegation.

A pattern of racketeering activity requires at least two (2) acts of racketeering within ten (10) years of one another. U.S.C.A. 18 Section 1961(5). However, a pattern requires something more than two (2) isolated criminal offenses.

H.J. Inc., 492 U.S. at 237. In order for the acts to form a pattern, they must be related so as to be ordered or arranged. (Id., at 238).

In H.J. Inc., petitioners, customers of Northwestern Bell Telephone Company, alleged that at different times over the course of at least six (6) years, officers and employees of the phone company gave bribes to members of the Minnesota Public Utilities Commission (MPUC). The alleged objective of the alleged bribes was to cause the commissioners to approve unfair and unreasonable phone rates. The Supreme court reversed summary judgment from the lower court holding that the petitioners had alleged multiple predicate acts since RICO defines bribery as a racketeering activity. (Id., at 250). Moreover, the Court held that petitioners may have been able to show that the predicate acts

constituted a pattern since the alleged acts of bribery were said to be related to the common purpose of influencing the decisions of the MPUC. (Id., at 250).

In addition to showing the relatedness of racketeering activities, a plaintiff must also show that the acts amount to or constitute a threat of continued racketeering activity. (Id., at 239). Continuity over a closed period may be established by proving a series of related predicates over a substantial period of time. (Id., at 242). Continuity may also be established by proving that acts over a shorter period of time constitute a threat of continuity. (Id., at 242). In H.J. Inc., the plaintiff may have been able to prove continuity since they alleged that the racketeering acts occurred frequently over a period of at least six (6) years. (Id., at 250). The

same allegations may have also established a threat of continuity by showing that the alleged bribes were a regular way of conducting business for Northwest Bell or for the MPUC.

In the case at bar, petitioner has failed to allege any pattern of racketeering. Petitioner has not alleged a relationship between any acts of racketeering nor has he alleged any acts which constitute continued racketeering activity or a threat of continued activity. Indeed, as previously explained, petitioner has not even alleged any predicate racketeering acts under RICO. Therefore, it is not possible that petitioner could have alleged a pattern of racketeering since no racketeering acts were alleged.

c. **The Petitioner Has Failed To Allege The Existence Of A RICO Enterprise.**

In a RICO action, the existence of a racketeering enterprise must be proven. United States v. Turkette, 452 U.S. 576, 580, 581 (1981). An enterprise can be a legal entity or any association in fact whereby a group of persons associate together for the common purpose of engaging in a course of conduct. (Id., at 582, 583). The existence of an enterprise is proven by evidence of an ongoing formal or informal organization and by evidence that the various associates function as a continuing unit. (Id., at 583). The plaintiff must present specific allegations from which it can be inferred that the defendant did belong to the association, the length of time the association lasted, and each defendants' role in the operation or management of the

enterprise. Plount v. American Home Assur. Co. Inc., 668 F.Supp. 204, 206 (S.D.N.Y. 1987).

Once again, the petitioner's failure to allege any racketeering activities precludes a finding of any set of facts under which a RICO enterprise can be found. Even if the petitioner's complaint can be construed as alleging an association-in-fact, he has failed to allege a RICO enterprise because he has failed to allege that the common purpose of the association is to conduct racketeering activity.

II. COUNT IV OF PETITIONER'S COMPLAINT WAS PROPERLY DISMISSED BECAUSE PETITIONER FAILED TO SHOW THAT HE IS ENTITLED TO RELIEF.

A complaint must do more than merely state a grievance. It must provide sufficient detail so that the defendant,

and the court, can obtain a fair idea of what the plaintiff is complaining of. Moore's Federal Practice, 2d Ed., Volume 2(A), Section 8.13, page 8-73. The petitioner asserts that sanctions should be imposed upon respondents "pursuant to Chapter 2923 of the Ohio Revised Code." (Complaint p. 9). However, the petitioner failed to specify which, if any, sections of Chapter 2923 of the Ohio Revised Code were violated. Furthermore, petitioner failed to plead any facts which would support a claim under Chapter 2923.

A pleading must show that the pleader is entitled to relief. Altman v. Central of Georgia Railway Co., 254 F.Supp. 167 (D.C. Cir. 1965) aff'd in part and rev'd in part 363 F.2d 284 (1966) cert denied 385 U.S. 920. Count IV of the petitioner's complaint failed to allege any facts whatsoever showing that the petitioner was

entitled to relief. Under Federal Rule 12(B)(6), a complaint may be dismissed if it fails to state a claim upon which judicial relief can be granted. Davis 442 U.S. at 244. Accordingly, the district court properly dismissed and the appeals court properly affirmed the dismissal of count IV of the petitioner's complaint.

CONCLUSION

The Petition for a Writ of Certiorari should be denied in this case because petitioner's complaint was properly dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). Petitioner failed to specify which sections, if any, of 18 U.S.C. Section 1962 respondents allegedly violated. Petitioner failed to allege any pattern of racketeering activity and petitioner failed to allege the existence of a RICO enterprise. Petitioner also failed to show that he is entitled to relief on count IV of his original complaint.

Supreme Court Rule 10.1 states:

> A review of writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor.

There are no special and important reasons to exercise judicial discretion in this case. The district court and court of appeals have not departed from the accepted and usual course of judicial proceedings. The standard of Conley v. Gibson, 355 U.S. 41 (1957), was properly applied when granting the respondents' 12(b)(6) motion to dismiss. The requirements for pleading a RICO claim were also correctly evaluated.

Finally, the granting of Rule 11 sanctions by the district court and appeals court provides additional insight for this court that the Petition for a Writ of Certiorari is a baseless waste of this court's time. To date, petitioner's claim has been properly dismissed twice, and petitioner's counsel has been properly sanctioned twice in accordance with Federal Rule of Civil Procedure 11. A

denial of this Petition for a Writ of Certiorari would be a most fitting end to this unfounded protracted litigation.